

Social, Economic and Cultural Rights

Should they be Protected in the New Constitution?

What are Social, Economic and Cultural Rights?

“Liberty, Equality and Fraternity” was the slogan of the French Revolution, and some writers have used the slogan as a rough guide to divide human rights into three “generations”.

The first generation of human rights, which were the first to be recognised in international law, are those concerned with “liberty”, i.e. with the right to participate in political life. Examples of these rights are the rights to personal liberty and the protection of law, freedom of association and speech, and the right to vote in elections.

The second generation of rights are those directed at bringing about equal treatment for all members of society. These rights are also called social, economic and cultural rights, and they include such rights as:

- the right to work, to free choice of employment, to just and favourable conditions of work, including equal pay for equal work, and protection against unemployment;
- the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay;
- the right to education, which should be free at least in the elementary and fundamental stages;
- the right to housing; and
- the right to social security, including social insurance.
- the right of different cultural groups to maintain their cultural identity and practices.

The third generation of rights [a broad and rather woolly category] are those directed at “fraternity”, i.e. at ensuring social harmony. They include:

- the right to a healthy environment, including the right to clean water;
- the right to natural resources;
- group and collective rights;
- the right to self-determination; and
- inter-generational rights.

Here, when we refer to “social, economic and cultural rights” [“SEC rights”] we mean second-generation rights as well as any third-generation rights which are capable of being defined reasonably clearly.

Several SEC rights are enunciated in the Universal Declaration of Human Rights of 1948 and many more in the International Covenant on Economic, Social and Cultural Rights of 1966.

Should SEC Rights be Protected by the New Constitution?

There is a strong moral argument for protecting SEC rights in the Declaration or Bill of Rights in the our new constitution. Most Zimbabweans face hardship and poverty. To them, first-generation rights such as freedom of expression and association may be less important than social and economic rights such as the right to adequate housing

and health care. The right to be legally represented by a lawyer of one's choice, for example, is not much use to someone who cannot afford to pay the lawyer's fees; the right to travel anywhere in Zimbabwe is of little importance to someone who cannot afford a bus fare. If the new constitution does not protect at least some basic SEC rights it is liable to be seen as a document drawn up by members of the political and social élite for their own benefit, rather than addressing the concerns of the broad mass of the people.

Difficulties in Enforcing Constitutionally Protected SEC Rights

If SEC rights are to be protected by the new constitution, how will they be enforced? This is not an easy question to answer, firstly because it is not always clear who has a duty to provide SEC rights; and, secondly, because it may be financially ruinous for the country to provide them.

Who will have the duty of providing SEC rights?

Giving someone a right to something necessarily involves imposing a duty on someone else to provide that thing. As lawyers put it, every right must have a corresponding duty, and that duty must be imposed on someone.

Constitutional rights are normally regarded as "vertical", i.e. enforceable against the State, and not "horizontal", i.e. enforceable by one individual against another. This is the case with most SEC rights: the State is expected to provide the services and facilities needed to give effect to the rights. But there may be grey areas, where the responsibility for providing the right is not clear.

Take the right to education, for example. Clearly the State is expected to provide enough schools and teachers to satisfy the needs of the country's children. Obviously the right would not allow poor parents to pick a rich businessman at random and compel him to pay for their children's education. But, would the right allow parents to demand that a private school accept their children even though they cannot afford the school fees? And would the right prevent a school from expelling a child on the ground of non-payment of fees? These are some of the grey areas mentioned above.

As another example, take the right to adequate housing. If this right is protected in the new constitution then generally it is the State that would have a duty to satisfy it. Householders should not be compelled to accommodate homeless people in vacant rooms in their homes. On the other hand, the State might call on others to assist it in providing accommodation, for example by requiring employers to provide housing for their employees. How far the State could go in sharing its responsibilities in this way is debatable — another grey area.

How far should SEC rights be enforceable?

Even if SEC rights are set out in the new constitution, it may not be possible to give full effect to them, given the country's slender financial resources. As an example, take again the right to education. Zimbabwe has done better than its neighbours in providing primary school education to its children, but providing all its children with secondary and tertiary education would overstretch its resources. The same goes for other SEC rights: the government lacks the resources to provide all Zimbabweans with access to clean drinking water and adequate housing, for instance, and is barely able to provide them with basic health care.

Another problem with enforcing SEC rights if they are contained in the new constitution is that, like all other constitutional rights, they would have to be enforced through the courts. The courts would have to balance competing claims of fundamental social values — they might have to decide, for example, whether limited financial resources should be expended on providing clean water rather than schools — and this is not something that the courts are well fitted to do. Judges and courts lack the political legitimacy and institutional competence to decide such matters. Furthermore, the courts cannot raise revenue; that is the province of the legislature. The constitutional doctrine of separation of powers lays down that it is the function of the legislature and executive between them to decide how revenue is to be raised and how it is to be spent, and the courts must not meddle in that sphere. It would be wrong for a court to order the State to spend particular sums on, say, education, when the effect would be to reduce the revenue available for health.

How SEC Rights Can be Dealt with in the New Constitution

Given the difficulties in enforcing constitutionally-protected SEC rights, it is not surprising that the constitutions of countries throughout the world adopt different approaches towards these rights.

Countries where SEC rights are not enforceable

The constitutions of some countries — India, Ireland and Namibia, for example — set out SEC rights but state specifically that they are not enforceable through the courts. Instead, the rights are stated to be directive principles of social policy or good governance which must guide the Legislature and the Executive in making and applying laws. The effect of this depends on the approach taken by the courts in the countries concerned. The Indian Supreme Court, for example, has interpreted directive principles expansively and has ruled that the right to life includes the right to health and health care, thereby giving real legal effect to at least some economic and social rights.

Constitutions where SEC rights are enforceable

Other countries' constitutions do have enforceable economic and social rights, notably South Africa, Thailand, Indonesia, Afghanistan, Brazil, Argentina, Bolivia, Ecuador, South Korea, Cuba, Kenya, Uganda, and Ethiopia.

Most of the SEC rights set out in the South African Constitution are hedged about with limitations which relate to reasonableness and the availability of funds. For example, the right of access to adequate housing (set out in section 26) requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right. This formulation has two advantages: first, it makes it clear that the State is primarily responsible for providing housing; second, it recognises that the State does not have the resources to provide everyone immediately with adequate housing. Other SEC rights are subject to similar limitations.

These limits are very important because they allow the Constitutional Court to give due weight to the dichotomy between a stated right — for example, “Everyone has the right to have access to adequate housing” — and the State's inability to satisfy that right immediately. If there were no such limits there would probably be a clash between the executive and legislature, on one side, and the judiciary on the other.

The Constitutional Court of South Africa has developed a considerable body of case-law in which it has affirmed SEC rights while recognising its limited power to control broad issues of government policy. For instance, the court has accepted that the government must be able to evict squatters who are illegally occupying private land, but has laid down that the government should provide at least temporary accommodation for squatters who would be in a desperate plight if they were evicted. The court has adopted a basic doctrine of “reasonableness”, under which the court may require the State to take measures to meet its constitutional obligations and may evaluate the reasonableness of those measures, but will determine their reasonableness in the light of budgetary implications and will not seek to rearrange the State’s budgets.

In the New Zimbabwean Constitution?

The makers of the new Zimbabwean constitution would do well to follow the lead of South Africa in its treatment of SEC rights. Zimbabwe faces many of the same socio-economic problems as South Africa and has fewer resources to deal with them. Some provision must be made for SEC rights in the new constitution if it is to be accepted by the broad mass of the people as “their” constitution; but if the new constitution makes those rights unenforceable, the needy sections of society — the majority of our people, in other words — are likely to reject the constitution as irrelevant at best and fraudulent at worst. Making those rights enforceable is feasible, as South Africa has shown, and does not necessarily lead the courts to intrude into areas of policy which are the preserve of the Legislature and the Executive. It might, however, allow people to ensure, at least to a limited extent, that the government expends its resources wisely and in their interests.